

FEDERAL ENERGY REGULATORY COMMISSION  
Washington, D.C. 20426

August 18, 2005

In Reply Refer To:  
Basin Creek Equity Partners, L.L.C.,  
Docket Nos. ER05-968-000 and  
ER05-986-001

Winston & Strawn LLP  
Attn: Margaret H. Claybour, Esq.  
Counsel for Basin Creek Equity Partners, L.L.C.  
1700 K Street, N.W.  
Washington, D.C. 20006-3617

Dear Ms. Claybour:

1. On May 13, 2005, as amended on July 14, 2005, Basin Creek Equity Partners, L.L.C. (Basin Creek) filed an application for market-based rate authority with an accompanying tariff. The proposed market-based rate tariff provides for the sale of capacity, energy, and ancillary services at market-based rates, the reassignment of transmission capacity, and the resale of transmission congestion rights.<sup>1</sup> Basin Creek's proposed tariff also incorporates the Commission's market behavior rules<sup>2</sup> and addresses the Commission's change in status reporting requirement.<sup>3</sup> As discussed below, Basin Creek's submittal satisfies the Commission's standards for market-based rate authority and is accepted for filing, effective July 12, 2005, as requested.<sup>4</sup>

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<sup>1</sup> Basin Creek's proposed tariff provides for the sale of certain ancillary services in the markets administered by the New York Independent System Operator, Inc. (NYISO), ISO New England, Inc. (ISO-NE), California Independent System Operator (CAISO), and PJM Interconnection, L.L.C. (PJM).

<sup>2</sup> *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 (2004).

<sup>3</sup> *Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

<sup>4</sup> FERC Electric Tariff, Original Volume No. 1, Original Sheet Nos. 1-7.

2. Basin Creek states that it is a Delaware limited liability company engaged in the business of developing, constructing, owning, and operating a natural gas-fired power plant located near Butte, Montana (Basin Creek Plant). Basin Creek states that the Basin Creek Plant has a planned operating capacity of approximately 51.8 MW and is currently under construction. Basin Creek adds that the full output of the Basin Creek Plant, upon its completion, will be sold by Basin Creek to the NorthWestern Corporation (NorthWestern) pursuant to a 20-year agreement (NorthWestern Agreement). Basin Creek states that the Basin Creek Plant is expected to begin operational testing in September 2005.

### **Notice and Responsive Pleadings**

3. Notice of Basin Creek's May 13, 2005 filing was published in the *Federal Register*, 70 Fed. Reg. 29,729 (2005), with protests and motions to intervene due on or before May 4, 2005. A motion to intervene and comments were timely filed by the Montana Consumer Counsel (MCC). In its comments, the MCC states that while it does not oppose Basin Creek's application, clarification is required as to whether the NorthWestern Agreement must be filed with the Commission or whether, conversely, Basin Creek will be subject to the Commission's quarterly reporting requirements as they relate to this agreement.<sup>5</sup>

4. Notice of Basin Creek's July 14, 2005 filing was published in the *Federal Register*, 70 Fed. Reg. 42,543 (2005), with protests and motions to intervene due on or before July 29, 2005. None was filed.

### **Discussion**

#### **Procedural Matters**

5. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>6</sup> the timely-filed, unopposed motion to intervene submitted by the MCC serves to make it a party to this proceeding.

#### **Market-Based Rate Authorization**

6. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers

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<sup>5</sup> See MCC Comments at 2, citing *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002), *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074 (2002).

<sup>6</sup> 18 C.F.R. § 385.214 (2005).

whether there is evidence of affiliate abuse or reciprocal dealing.<sup>7</sup> As discussed below, the Commission concludes that Basin Creek satisfies the Commission's standards for market-based rate authority.

7. In its order issued in *AEP Power Marketing, Inc.*,<sup>8</sup> the Commission adopted two indicative screens for assessing generation market power, the pivotal supplier screen and the wholesale market share screen. Section 35.27(a) of the Commission's regulations provides that applicants shall not be required to demonstrate any lack of market power in generation with respect to sales from capacity constructed after July 9, 1996.<sup>9</sup>

8. If an applicant sites generation in an area where it or its affiliates own or control other generation assets, the applicant must study whether its new capacity, when added to existing capacity, raises generation market power concerns.<sup>10</sup> In the July 8 Order, the Commission clarified that in circumstances where construction on all of an applicant's generation commenced after July 9, 1996, no generation market power analysis need be performed.<sup>11</sup> Basin Creek cites to the above exemption and consequently did not perform a market power analysis.

9. Basin Creek states that neither it nor any of its affiliates own, operate, or control any facilities for the transmission of electricity in interstate commerce other than the component allowing the Basin Creek Plant to be interconnected to the NorthWestern transmission system. Based on this representation, the Commission finds that Basin Creek satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

10. Basin Creek states that neither it nor any of its affiliates control building sites, fuel supply services, delivery services, engineering firms, or construction firms serving power generators. Based on these representations, the Commission is satisfied that Basin Creek cannot erect barriers to entry.

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<sup>7</sup> See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155, at 61,919 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281, at 61,899 (1996); accord *Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223, at 62,062-63 (1994).

<sup>8</sup> 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

<sup>9</sup> 18 C.F.R. § 35.27(a) (2005). We note that the Commission intends to address, as part of the generic rulemaking proceeding in Docket No. RM04-7-000, whether to retain or modify section 35.27(a) of its regulations.

<sup>10</sup> See April 14 Order, 107 FERC ¶ 61,018 at P 69.

<sup>11</sup> See July 8 Order, 108 FERC ¶ 61,026 at P 110.

11. Basin Creek states that neither it nor any of its affiliates have a franchised service territory for the sale of electricity to captive customers. Based on this representation, the Commission finds that Basin Creek satisfies the Commission's concerns with regard to affiliate abuse.

12. As noted above, Basin Creek's proposed tariff authorizes Basin Creek to engage in the sale of certain ancillary services at market-based rates into the markets operated by CAISO, ISO-NE, NYISO, and PJM. Consistent with Commission precedent granting authority to sellers to engage in such transactions in these markets, the Commission will grant Basin Creek's request.<sup>12</sup> Basin Creek also proposes to make sales of certain ancillary services in additional geographic markets as the Commission may specify and authorize from time-to-time in orders that extend such authority to all sellers previously authorized to sell energy and/or capacity at market-based rates. The Commission grants Basin Creek's request in this regard; however, this grant does not relieve Basin Creek of the requirement to have current and complete tariffs on file with the Commission, pursuant to 18 C.F.R. § 35.1 (2005).<sup>13</sup>

13. Basin Creek's proposed tariff also allows for the sale of certain ancillary services to third party suppliers in other markets consistent with *Avista Corporation*.<sup>14</sup> The Commission will grant this request.

14. Basin Creek's proposed tariff also authorizes Basin Creek to resell transmission congestion rights and to reassign transmission capacity. We find that this requested authority satisfies the Commission's requirements.<sup>15</sup> Accordingly, the Commission will grant these requests.

### **Waivers, Authorizations, and Reporting Requirements**

15. Basin Creek requests the following waivers and authorizations: (1) waiver of Subparts B and C of Part 35 of the Commission's regulations requiring the filing of

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<sup>12</sup> See, e.g., *New England Power Pool*, 85 FERC ¶ 61,379 (1998), *reh'g denied*, 95 FERC ¶ 61,074 (2001); *Atlantic City Electric Co.*, 86 FERC ¶ 61,248, *clarified*, 86 FERC ¶ 61,310 (1999); *Central Hudson Gas & Electric Corp.*, 86 FERC ¶ 61,062, *order on reh'g*, 88 FERC ¶ 61,138 (1999); and *AES Redondo Beach, L.L.C.*, 85 FERC ¶ 61,123 (1998), *order on reh'g*, 87 FERC ¶ 61,208 (1999), *order on reh'g and clarification*, 90 FERC ¶ 61,036 (2000).

<sup>13</sup> *Calhoun Power Company*, 96 FERC ¶ 61,056 (2001).

<sup>14</sup> 87 FERC ¶ 61,223, *order on reh'g*, 89 FERC ¶ 61,136 (1999).

<sup>15</sup> See *Southwestern Public Service Co.*, 80 FERC ¶ 61,245 (1997), and *California Independent System Operator, Inc.*, 89 FERC ¶ 61,153 (1999).

cost-of-service information, except as to sections 35.12(a), 35.13(b), 35.15, and 35.16; (2) waiver of Parts 41, 101, and 141 of the Commission's accounting and periodic reporting requirements; (3) abbreviated filings with respect to interlocking directorates under Part 45 of the Commission's regulations; (4) blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability; and (5) waiver of the requirements applicable to transmission providers, as set forth by the Commission in Order Nos. 888 and 889.

16. The Commission will grant the requested waivers and authorizations consistent with those granted other entities with market-based rate authorizations.<sup>16</sup> Notwithstanding the waiver of the accounting and reporting requirements here, we expect Basin Creek to keep its accounting records in accordance with generally accepted accounting principles.

17. Within 30 days of the date of issuance of this order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by Basin Creek should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.211 and 385.214 (2005).

18. Absent a request to be heard within the period set forth above, Basin Creek is hereby authorized to issue securities and assume obligations or liabilities as guarantor, indorser, surety, or otherwise, in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of Basin Creek, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

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<sup>16</sup> It should be noted that the Commission is examining the issue of continued applicability of the waivers of its accounting and reporting requirements (18 C.F.R. Parts 41, 101, and 141) as well as continued applicability of the blanket authorization for the issuance of securities and the assumption of obligations and liabilities (18 C.F.R. Part 34). *See Accounting and Reporting of Financial Instruments, Comprehensive Income, Derivatives and Hedging Activities*, Order No. 627, at P 23 and P 24, 67 Fed. Reg. 67,691 (Nov. 6, 2002), FERC Stats. & Regs. ¶ 31,134 (2002).

19. Until further order of this Commission, the full requirements of Part 45 of the Commission's regulations, except as noted below, are hereby waived with respect to any person now holding or who may hold an otherwise proscribed interlocking directorate involving Basin Creek. Any such person instead shall timely file a sworn application providing the following information:<sup>17</sup>

- (1) full name and business address; and
- (2) all jurisdictional interlocks, identifying the affected companies and the positions held by that person.

20. The Commission reserves the right to modify this order to require a further showing that neither the public nor private interests will be adversely affected by continued Commission approval of Basin Creek's issuances of securities or assumptions of liabilities, or by the continued holding of any affected interlocks.

21. With respect to Basin Creeks' request for waiver of Order Nos. 888 and 889, Basin Creek states that it does not own, operate, or control any transmission-related equipment other than the component allowing the Basin Creek Plant to be interconnected to the NorthWestern transmission system. In its amended filing, Basin Creek further clarifies that these facilities are limited and discrete and do not form a part of any integrated electricity grid. In *Black Creek Hydro, Inc.*,<sup>18</sup> the Commission set forth criteria for waiver of Order No. 888 (the requirement that a transmission provider have on file an open access transmission tariff).<sup>19</sup> The Commission clarified that it will grant waiver of these requirements by public utilities that can show that they own, operate or control only limited and discrete transmission facilities (facilities that do not form an integrated transmission grid). Based on Basin Creek's representations, the Commission finds that this showing has been satisfied here and therefore grants the requested waivers.

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<sup>17</sup> For current interlocks, applications should be filed within 30 days of the date of this order. We note that the Commission has issued a proposed rulemaking, *Commission Authorization to Hold Interlocking Directorates*, 110 FERC ¶ 61,343 (2005), which is considering modifications to 18 C.F.R. Part 45. The Commission is considering changing its requirements as to timing and also is examining the possibility of no longer granting a waiver of the full requirements of Part 45 in its orders granting market-based rate authority.

<sup>18</sup> *Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232 (1996) (*Black Creek*).

<sup>19</sup> These standards for waiver of Order No. 888 also apply to a requested waiver of Order No. 889, which sets forth a corollary requirement relating to the transmission provider's obligation to establish an open access same-time information system.

22. In response to the MCC's requested clarification, the Commission hereby clarifies that Basin Creek will be subject to the Commission's quarterly reporting requirements as they relate to the NorthWestern Agreement. Basin Creek is reminded that consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter.<sup>20</sup> Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.<sup>21</sup> Accordingly, Basin Creek must file its first Electric Quarterly Report no later than 30 days after the first quarter Basin Creek's rate schedule is in effect.

23. Basin Creek must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.<sup>22</sup> Order No. 652 requires that the change in status reporting requirement be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates. As noted above, Basin Creek has included the change in status reporting requirement in its tariff.

24. Basin Creek is directed to file an updated market power analysis within three years of the date of this order, and every three years thereafter. The Commission also reserves the right to require such analyses at any intervening time.

By direction of the Commission.

Linda Mitry,  
Deputy Secretary.

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<sup>20</sup> Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/docs-filing/eqr.asp>.

<sup>21</sup> The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in a report, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

<sup>22</sup> See n.3, *supra*.